10-3-2012

State v. Steinemer Appellant's Brief Dckt. 39869

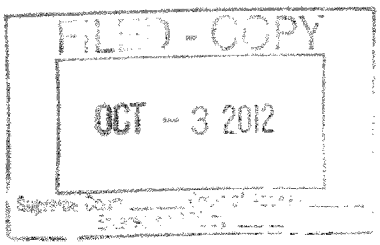
IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO, Plaintiff-Respondent, vs. DOUGLAS JAMES STEINEMER, Respondent/Respondent.	)	Docket No. 39869

OPENING BRIEF OF APPELLANT

Appeal from the District Court of the Fourth
Judicial District of the State of Idaho
In and For the County of Ada

HONORABLE TIMOTHY HANSEN,
District Judge



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II. STATEMENT OF THE CASE

A. *Nature of the Case*

This is an appeal from the denial of a motion to withdraw a guilty plea made prior to sentencing. Douglas Steinemer asks this Court to reverse the denial of his motion and remand for a trial.

B. *Procedural History and Statement of Facts*

Appellant Douglas Steinemer was charged by Indictment with one count of first-degree kidnapping[1] and three counts of rape. CR 13. The kidnapping count did not charge a second defendant, but alleged all three counts were committed "together with Hans Michael Holsopple." *Id.* Mr. Holsopple is Mr. Steinemer's father. PSI, pg. 6. Mr. Steinemer stood silent at the entry of plea hearing and not guilty pleas were entered for him by the court. CR 41.

On March 31, 2011, Mr. Steinemer filed a motion for disqualification of public defender because he felt that he was being harassed by the public defender's office, that communications with the office had been extremely difficult, that the office had neglected his case and that the office had violated his due process rights. CR 93. On April 15, 2011, Mr. Steinemer filed a pro se request for discovery and a motion for a discovery deadline. CR 101-105. John DeFranco, a conflict public defender, later substituted as counsel for the Ada County Public Defender's Office. CR 113.

On July 12, 2011, Mr. Steinemer filled out a guilty plea advisory form, CR 151-157. Paragraph 19 of the guilty plea advisory form asked if Mr. Steinemer had "reviewed the evidence

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[1] Chapter 45 of Title 18 of the Idaho Code uses both the "kidnapping" and "kidnaping" versions of the word. Since Mr. Steinemer was charged with first-degree "kidnapping" and not second-degree "kidnaping," the double p version will be used throughout.

provided to your attorney in discovery?" CR 155. Mr. Steinemer at first circled "NO," but then crossed that answer out, circled "YES," and initialed the change. *Id.* The district court did not question Mr. Steinemer about the change in his answer at paragraph 19.

The court accepted Mr. Steinemer's guilty pleas to Counts I (kidnapping) and to an amended Count II (rape). T pg. 17, ln. 10-21; pg. 26, ln. 8-9. Part of the settlement agreement was that the state would recommend a 25-year sentence with a 13-year fixed term on each count with the sentences to run concurrently. T pg. 6, ln. 24 - pg. 7, ln. 1. Mr. Steinemer also agreed to participate in the presentence investigation ("PSI") and obtain a psychosexual evaluation ("PSE"). T pg. 7, ln. 4-7. The court set a sentencing hearing on October 4, 2011. T pg. 28, ln. 19-22.

On August 26, 2011, Mr. Steinemer filed a pro se motion to withdraw his guilty plea. He stated as grounds for the motion that he had not seen all the audio and video recordings in discovery and thus he could not make a fully informed decision to enter a guilty plea. CR 160. His attorney also filed an I.R.E. 33(c) motion. CR 162.

Counsel stated the following in his affidavit:

> 2. Steinemer informed me the week of August 15, 2011 he was considering withdrawing his plea of guilty;
>
> 3. I discussed the matter with him briefly by telephone on August 19, 2011;
>
> 4. I met with him at the jail on August 21, 2011;
>
> 5. We discussed further the issue of withdrawing his plea;
>
> 6. I explained to him the court has the discretion to allow him to do it as well as deny his request;
>
> 7. I explained the standard articulated within the rule being higher after

sentencing than before;

8. I discussed the possible benefits as well as the risks associated with the motion;

9. I asked him to take some time to think about his decision;

10. On August 22, 2011, he called my office and asked me to file it;

11. My opinion is he is dissatisfied with the plea bargain in his case which is an aggregate sentence of twenty five 25 years consisting of thirteen 13 years fixed and twelve 12 years indeterminate;

12. Additionally he alleges he has a defense related to the intent element of the crime: Kidnapping in the First Degree;

13. He wants to pursue a potential affirmative defense to both charges;

14. He believes he made his decision to plead guilty in haste.

CR 164.

On September 26, 2011, Mr. Steinemer filed an affidavit. It alleged, in pertinent part, the following:

3. My attorney neither showed me the video nor provided me an opportunity to listen to the audio of the victim's interview with law enforcement prior to me entering my guilty plea;

4. On the guilty plea advisory form there was a question regarding the discovery in the case and my attorney told me to check yes as having seen the video and listened to the audio;

5. Subsequent to the guilty plea my attorney provided me an opportunity to see and listen to these materials;

6. The video and the audio are from the same single interview of the victim;

7. After having reviewed this evidence I believe there is material that I was unaware of that would have supported my defense;

8. I believe the attorney violated his ethical obligation to provide this material for me to

experience prior to my entry of plea;

9. I never would have made the decision to plead guilty if I had seen this material prior to entering my plea;

10. The statements of the victim I am referring to are her articulating my father was in control and when she was asked whether I was in fear for my life; she said no, because I was following his commands;

11. I believe this supports my theory of my defense that I acted under the duress or coercion of my father;

12. Due to my attorney's oversight in providing me the opportunity to see these materials I made a mistake in entering my plea.

CR 172-73.

Robert Chastain appeared as defense counsel, in place of Mr. DeFranco, on October 17, 2011. CR 182.

At the hearing on the motion, Mr. Steinemer submitted the motion based upon the pleadings and affidavits previously filed. T pg. 32, ln. 16-17.[2] The state called two witnesses.

Phil Tuttle, an investigator from the prosecutor's office, listened to recorded jail calls made on March 5, 2011, where Mr. Steinemer told an unknown female that:

> When I go to court I will have them *(documents of victim's statements to investigators)* submitted so that – so that way the jury can hear her saying that she knows that I was in fear of my father, she knows that I was not . . . or I was in control of my father and all that good gossip stuff so that way the jury like understands that I had nothing to do with it. That I didn't plan it. All that bullshit.

Defendant's Exhibit A (emphasis to the transcriber's parenthetical phrase within quote added).

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[2] These documents were not entered as exhibits at the hearing, but the parties and the court referred to them during the hearing. The state did not ask for an opportunity to cross-examine Mr. Steinemer about the contents of the affidavit. The video recording of the complaining witness was also not introduced at the hearing.

See also, T pg. 42, ln. 4-17 (Mr. Tuttle attempting to read transcription into the record).

Mr. DeFranco testified that he reviewed the discovery with Mr. Steinemer. He admitted that "it would not be accurate to say" that he "went through every police report . . . and the grand jury transcript individually," with his client, but said that they "certainly talked about it in substance." T pg. 51, ln. 7-13. In this regard, Mr. DeFranco's testimony is consistent with Mr. Steinemer's telephone statement that he had seen written witness statements.

Prior to the entry of the guilty plea, Mr. DeFranco spoke to Mr. Steinemer about the possibility of raising a threats and menaces defense under I.C. § 18-201(4). From the discovery, Mr. DeFranco observed that "law enforcement was onto this notion that somehow there were two people and one person may have been in control. And that was something that came from the alleged victim in their initial interview." T pg. 55, ln. 25 - pg. 56, ln. 3. Mr. DeFranco continued by saying "that same information that was originally received by law enforcement was also presented in the grand jury and to a certain degree in the alleged victim's participation in the codefendant's sentencing." T pg. 56, ln. 17-23. Mr. DeFranco approached the state with this defense theory in an unsuccessful effort to obtain a more favorable settlement offer for Mr. Steinemer. T pg. 57, ln. 12 - pg. 58, ln. 3.

Mr. DeFranco's testimony supported the allegations in Mr. Steinemer's affidavit in several respects. First, Mr. DeFranco confirmed paragraphs 4 ("My attorney neither showed me the video nor provided me an opportunity to listen to the audio of the victim's interview with law enforcement prior to me entering my guilty plea[.]") and 5 ("Subsequent to the guilty plea my attorney provided me an opportunity to see and listen to these materials[.]") by admitting that he did not play the audio and video recordings of the witness statement until after the change of plea

hearing. T pg. 53, ln. 3-7. ("After his guilty plea, but I believe before his filing his motion to withdraw his guilty plea, I had my investigator go out and either watch the video and listen to the audio or both with Mr. Steinemer[.]") This occurred after Mr. Steinemer called counsel to say he wanted to withdraw his plea. T pg. 61, ln. 4-9.

Mr. DeFranco also corroborated paragraph 4 of Mr. Steinemer's affidavit ("On the guilty plea advisory form there was a question regarding the discovery in the case and my attorney told me to check yes as having seen the video and listened to the audio[.]"). While he did not have an independent recollection of discussing paragraph 19 of the guilty plea advisory form, he testified that "I would have said that if you want to plead guilty and you want the Court to accept your plea, you have to check this." T pg. 59, ln. 18-20. In other words, Mr. DeFranco told Mr. Steinemer to say he had seen all the discovery, which would include the audio and video, irrespective of whether that was true, if he wanted the court to accept his guilty plea. Mr. DeFranco testified that he did not force Mr. Steinemer to answer falsely. T pg. 59, ln. 22-24.

Mr. DeFranco also corroborated Mr. Steinemer's paragraph 9 ("I never would have made the decision to plead guilty if I had seen this material prior to entering my plea[.]") because he observed that Mr. Steinemer became even more adamant about withdrawing his plea after he reviewed the audio and video recordings. T pg. 66, ln. 13-19.

The pro se motion was filed prior to the filing of the PSI, but after Mr. Steinemer had an opportunity to review the PSE with counsel. T pg. 68, ln. 1 - pg. 69, ln. 25; p. 70, ln. 4-7. (The copy of the PSE attached to the presentence report appears to have been faxed to Probation and Parole on August 11, 2012. PSI, p. 63.)

After the presentation of testimony, the court took judicial notice of and stated that it

would review the transcripts of the grand jury proceeding to determine what was said there relevant to the threats and menaces defense. T pg. 71, ln. 15-20; pg. 81, ln. 4-18. A review of that transcript shows that the complaining witness told the grand jury that she felt that Mr. Steinemer's father, Hans Holsopple, had some control over Mr. Steinemer based upon their actions and the conversation between them. Grand Jury T pg. 93, ln. 19-23.

The motion was denied in a written memorandum and decision. The court made the following findings and conclusions:

> In consideration of the foregoing the Court finds that Defendant has failed to meet his burden of proof that his guilty plea should be withdrawn. The evidence establishes that Defendant was fully aware well before he entered his guilty plea of statements by Ms. Sprague to the investigators that Defendant was acting under the direction of his father and that this was a defense to the charges against him. Furthermore although he indicates otherwise in his affidavit, Defendant had not seen the audio and video recordings before he decided to withdraw his guilty plea so his decision would not have been based on the actual review of that material. The Court also finds Mr. DeFranco did not force Defendant to change his answer to the question in the guilty plea advisory form that he had the chance to review all discovery in the possession of his attorney before entering his guilty plea. Rather, this was a decision Defendant made so the Court would accept his plea. Finally, the Court finds Defendant had the chance to review the psychosexual evaluation prior to deciding to withdraw his guilty plea. The Court acknowledges this does not mean Defendant's motion to withdraw guilty plea is necessarily comparable to one made after sentencing. Nonetheless it is a factor the Court has considered in making its decision. Accordingly the Court concludes that Defendant's guilty plea was neither coerced nor was it based upon a lack of information concerning a potential defense. Rather, as the Court found at the time Defendant entered his guilty plea on July 12, 2011, that plea was entered knowingly and voluntarily and with an understanding of the consequences.

CR 226-227 (internal citations omitted).

Mr. Steinemer was later sentenced to 30 years on each count with a fixed term of 13 years. The sentences were run concurrently. CR 234.

This appeal timely followed. CR 238.

III. ISSUE PRESENTED FOR REVIEW

Was it an abuse of discretion for the court to deny the motion to withdraw the guilty plea when it was made prior to sentencing and after a just cause was established?

IV. ARGUMENT

A. *Standard of Review*

Whether to grant a motion to withdraw a guilty plea lies in the discretion of the district court and such discretion should be liberally applied. *State v. Freeman*, 110 Idaho 117, 121, 714 P.2d 86, 90 (Ct. App. 1986). Appellate review of the denial of a motion to withdraw a plea is limited to determining whether the district court exercised sound judicial discretion as distinguished from arbitrary action. *Id.* The defendant bears the burden of proving, in the district court, that the plea should be withdrawn. *State v. Hanslovan*, 147 Idaho 530, 535, 211 P.3d 775, 780 (Ct. App. 2008). When the basis for the motion turns upon events that occurred outside of the judicial proceedings and the state has not acknowledged or stipulated to those facts, an evidentiary showing is required. *State v. Stone,* 147 Idaho 330, 333, 208 P.3d 734, 737 (Ct. App. 2009). In ruling on a motion to withdraw a guilty plea, the district court must determine, as a threshold matter, whether the plea was entered knowingly, intelligently, and voluntarily. *Hanslovan*, 147 Idaho at 536, 211 P.3d at 781. If the plea was voluntary, in the constitutional sense, then the court must determine whether other reasons exist to allow the defendant to withdraw the plea. *Id.* When the motion is made prior to sentencing, the defendant must present a just reason for withdrawing the plea. *Id.* at 535, 211 P.3d at 780. But where the defendant moves to withdraw his guilty plea before the imposition of sentence, "but after [he] has read the presentence report or received other information about his probable sentence, the court is to

exercise broad discretion, but may temp\er its liberality by weighing the defendant's apparent motive. *State v. Johnson*, 120 Idaho 408, 411, 816 P.2d 364, 366 (Ct. App. 1991) (citation omitted).

B. *The Trial Court Abused its Discretion*

The court's ruling was an abuse of discretion.

The court's decision is based upon a conclusion that Mr. Steinemer did not decide to file the motion to withdraw his guilty plea based upon the video evidence. This conclusion is based upon three findings. First, that Mr. Steinemer was "fully aware" of the complaining witness's statements to the investigators before he entered his guilty plea. Second, that Mr. Steinemer's decision to withdraw his guilty plea could not have been based upon the video because he had made his decision before he actually reviewed the video. Third, that his decision was made after he had reviewed the PSE. These findings, however, do not support the court's ruling.

First, the evidence does not show Mr. Steinemer was fully aware of the evidence supporting his defense at the time of the guilty plea. There was no evidence presented that he had actually read the grand jury transcript of Ms. Sprague's testimony, or read a written transcript of her statement to the investigators, or even read a written summary of the statement. While he and his attorney "talked about [the discovery] in substance," Mr. DeFranco admitted he did not go "through every police report . . . and the grand jury transcript individually" with his client. Also, Mr. Steinemer did not view the video of the interview. Thus, he was unaware of Ms. Sprague's facial expressions, gestures, body language and tone of voice during the interview. All of those are important when trying to access the effect the statements would have had on a jury. Thus, while he was aware of Ms. Sprague's statements, he was not "fully aware" of the complete

value of that evidence. As Mr. Steinemer argued below: "Most people would agree that audio and video recordings provide a fuller and more persuasive representation of a witness's believability and persuasiveness because they capture a witness's actual statements including the witness's voice inflection and, in the case of a video, demeanor. Hence it is not reasonable to equate a cold grand jury transcript with that of a witness's recorded statements." CR 217.

Second, Mr. Steinemer did not file his Rule 33(c) motion until after he had viewed the video. He called Mr. DeFranco on a Friday and said he wanted to withdraw his plea. T pg. 63, ln. 15-20. Mr. DeFranco visited him that next Sunday and said he would file the motion but wanted him to view the video. After viewing the video, "he maintained even more strongly that he wished to withdraw his guilty plea." He then filed his pro se motion and Mr. DeFranco filed one on the same day. Thus, while he told Mr. DeFranco he wanted to file the motion before having seen the video, he deferred doing so, on Mr. DeFranco's urging, until after he viewed it. So it cannot be concluded that the final decision to file the motion was not caused by viewing the video, as Mr. Steinemer alleged in his affidavit.

The court also found Mr. DeFranco did not force Mr. Steinemer to change his answer to paragraph 19 of the guilty plea advisory form. This finding, however, is largely irrelevant because Mr. Steinemer never claimed Mr. DeFranco "forced" him to change the answer. He stated that counsel told him to answer that he had reviewed all the discovery (irrespective of whether that was the case), if Mr. Steinemer wanted the court to accept the guilty plea. Mr. DeFranco admitted that was true. The allegation was made to explain his answer on the questionnaire in case the state tried to argue that he had viewed the video at the time of the plea. The fact that Mr. DeFranco did not tell Mr. Steinemer to answer paragraph 19 truthfully is also

"just cause" to withdraw the plea because the court would not have accepted the guilty plea had Mr. Steinemer answered that he had not reviewed all the discovery.

Third, the court found that Mr. Steinemer had review the psychosexual evaluation prior to deciding to withdraw his guilty plea. That finding does not support the court's ruling because there was no evidence that Mr. Steinemer was dissatisfied with the report after his review. Consequently, there is no reason to believe it could have been the reason he decided to file the Rule 33(c) motion. The only rational inference to be drawn is that the PSE had no effect on that decision. Mr. DeFranco did not testify that Mr. Steinemer was concerned about the PSE report. The results of the PSE would not have an effect on the state's recommendation of 25 years with 13 fixed. And the PSE was largely neutral, finding Mr. Steinemer to be of above average intelligence, overall to be a moderate risk to reoffend and moderately amendable to treatment. Moreover, the PSE was mitigating as it set forth Mr. Steinemer's history of physical and sexual abuse at the hands of his father and concluded that Mr. Steinemer was not a predatory sex offender. See PSE, p. 63; T pg. 108, ln. 8 - p. 110, ln. 14 (court's comments during sentencing). Thus, this final factor does not support the court's denial of the motion.

V. CONCLUSION

Mr. Steinemer did establish a just cause to withdraw his guilty plea. The court abused its discretion because its decision was not an exercise of reason because of its misunderstanding as to the full import of the video evidence, its misunderstanding of the timing of the Rule 33(c) motion and its illogical consideration of the timing of the PSE report. Therefore, the order denying his motion should be reversed and the case remanded for further proceedings.

Respectfully submitted this 3rd day of October, 2012.

Dennis Benjamin
Attorney for Douglas Steinemer

CERTIFICATE OF MAILING

I HEREBY CERTIFY that I have this 2nd day of October, 2012, caused two true and correct copies of the foregoing document to be placed in the United States mail, postage prepaid, addressed to:

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